

\*\*E-Filed 10/12/07\*\*

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

SAFRONIA DODD-OWENS, et al.,

**Plaintiffs,**

V.

## KYPHON, INC.,

Defendant.

Case Number C 06-3988 JF (HRL)

**ORDER<sup>1</sup> GRANTING MOTION TO  
STRIKE AND GRANTING LEAVE  
TO AMEND**

[re: docket nos. 29, 30]

Defendant Kyphon, Inc. ("Kyphon") moves to strike Plaintiffs' class action allegations.

Second Amended Complaint (“SAC”) at ¶¶ 20-42. For the reasons discussed below, the motion will be granted, with leave to amend.

## I. BACKGROUND

The original complaint in this action was filed on June 27, 2006. Plaintiffs Safronia Dodd-Owens (“Dodd-Owens”), Natalie Amaya (“Amaya”), Tera Bryer, Tiffany Socha (“Socha”), Teri Carr, and Elizabeth Glus (“Glus”) (collectively “Plaintiffs”) complained of gender discrimination by Kyphon, on behalf of themselves and all others similarly situated. The original complaint included nine claims pertaining to gender and pregnancy discrimination, sexual

<sup>1</sup> This disposition is not designated for publication and may not be cited.

1 harassment, and retaliation in violation of California and federal law.

2 On October 27, 2006, Plaintiffs moved for leave to amend the complaint. On November  
 3 9, 2006, the Court issued an order directing that the First Amended Complaint (“FAC”) be filed  
 4 as of right and denying as moot Kyphon’s previously-filed motions to dismiss six claims and to  
 5 strike the class action allegations from the complaint. The FAC included ten claims, of which  
 6 the first two were class action claims: (1) gender discrimination in violation of Title VII of the  
 7 Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e, *et seq.*; (2) gender discrimination in  
 8 violation of The Fair Employment and Housing Act (“FEHA”), Cal. Gov. Code § 12940; (3)  
 9 pregnancy discrimination against Dodd-Owens in violation of Title VII, 42 U.S.C. § 2000e, *et  
 10 seq.*; (4) retaliation against Dodd-Owens in violation of Title VII, 42 U.S.C. § 2000e-3; (5)  
 11 retaliation against Amaya in violation of Title VII, 42 U.S.C. § 2000e-3; (6) pregnancy  
 12 discrimination against Glus in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*; (7) retaliation  
 13 against Glus in violation of Title VII, 42 U.S.C. § 2000e-3 and Cal. Gov. Code § 12940(h); (8)  
 14 sexual harassment against Glus in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*; (9)  
 15 pregnancy discrimination against Socha in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*; and  
 16 (10) retaliation against Socha in violation of Title VII, 42 U.S.C. § 2000e-3.

17 On November 29, 2006, Kryphon moved to dismiss the second and fourth claims to the  
 18 extent that they relied upon FEHA. On the same date, Kryphon moved to strike the class action  
 19 allegations from the FAC. FAC at ¶¶ 20-42. Noting that many of the challenges in the motion to  
 20 strike likely should be resolved in the context of a motion for class certification, the Court  
 21 granted both motions with leave to amend. On February 9, 2007, the Court set a March 7, 2007  
 22 filing deadline for Plaintiffs’ amended pleading.

23 Plaintiff, however, failed to comply with the filing deadline, and Kyphon responded with  
 24 Rule 41(b) motion to dismiss. Following a May 25, 2007 hearing, the Court granted Kyphon’s  
 25 motion to dismiss in part, dismissing Plaintiffs’ FEHA claims without leave to amend, and  
 26 granted Plaintiffs’ leave to file a second amended complaint consistent with the February 9 order.

1       The SAC contains only one class action claim for gender discrimination under Title VII.<sup>2</sup>  
 2 Defendant has moved to strike this claim. Plaintiffs oppose the motion. The Court heard oral  
 3 argument on September 14, 2007.

4

## 5           **II. STANDARD OF REVIEW**

6       The Court may strike “from any pleading any insufficient defense or any redundant,  
 7 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Motions to strike  
 8 generally will not be granted unless it is clear that the matter to be stricken could not have any  
 9 possible bearing on the subject matter of the litigation. *LeDuc v. Kentucky Central Life Ins. Co.*,  
 10 814 F. Supp. 820, 830 (N.D. Cal. 1992). Allegations “supplying background or historical  
 11 material or other matter of an evidentiary nature will not be stricken unless unduly prejudicial to  
 12 defendant.” *Id.* Moreover, allegations that contribute to a full understanding of the complaint as  
 13 a whole need not be stricken. *Id.*

14

## 15           **III. DISCUSSION**

16       A motion to strike a class allegation is governed by Rule 23. *See, e.g., Bennett v. Nucor*  
 17 *Corp.*, No. 3:04 CV 00291, 2005 WL 1773948 at \* 2 n.1 (E.D. Ark. July 6, 2005). Plaintiffs and  
 18 Defendant dispute the appropriate timing of a Rule 23 review. Plaintiffs argue that Defendant’s  
 19 motion to strike on Rule 23 grounds is premature insofar as it is brought prior both to a motion  
 20 for certification and prior to discovery. Defendant responds that this case is ripe for Rule 23  
 review and Plaintiffs that have no absolute entitlement to discovery.

21       Defendant argues that the Court must evaluate the propriety of the class prior to a motion  
 22 for class certification because “Rule 23 itself mandates that ‘[a]s soon as practicable after the  
 23 commencement of an action brought as a class action, the court shall determine by order whether  
 24 it is to be so maintained.’” Reply Memorandum at 1. However, Defendant overstates this  
 25 requirement. In 2003, Congress amended Rule 23, replacing “as soon as practicable after the  
 26 commencement of an action,” with “at an early practicable time.” This change was not cosmetic;

---

28       <sup>2</sup> Plaintiffs’ SAC also contains six individual claims for retaliation under Title VII.

1 rather the Advisory Committee explained:

2 Time may be needed to gather information. Although an evaluation for the  
 3 probable outcome on the merits is not properly part of the certification decision,  
 4 discovery in aid of the certification decision often includes information required to  
 5 identify the nature of the issues that actually will be presented at trial. In this sense  
 6 it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those  
 7 aspects relevant to making the certification decision on an informed basis. . . . A  
 8 critical need is to determine how the case will be tried.

9 F. Rule Civ. Pro. Rule 23(c)(1)(A) Advisory Committee Notes; *see also Hurley v. U.S.*  
 10 *Healthworks Med. Group*, No. 05-0017, 2006 WL 1788994 at \*4 & n.1 (E.D. Wash. June 27,  
 11 2006) (explaining the amendment and noting that the amended language is “substantially  
 12 different”). While this amendment does not dictate that courts postpone Rule 23 analysis in  
 13 every case until a motion for class certification has been made, it is clear from the Committee’s  
 14 notes that the purpose of the amendment was to provide courts with more time and flexibility to  
 15 permit discovery and make informed decisions regarding class certification.

16 Citing cases decided before the amendment,<sup>3</sup> Defendant next argues that it is not  
 17 necessary for the Court to defer the certification decision until discovery has been conducted  
 18 because Plaintiffs have no absolute right to discovery. Defendants are correct in the sense that  
 19 even after the amendment it is within the court’s discretion whether or not to permit discovery.  
 20 However, in exercising this discretion, courts must be mindful of the complexity of certification:

21 [T]he class determination generally involves considerations that are enmeshed in  
 22 the factual and legal issues comprising the plaintiff’s cause of action. Sometimes  
 23 the issues are plain enough from the pleadings to determine whether the interests  
 24 of the absent parties are fairly encompassed within the named plaintiff’s claim,  
 25 and sometimes it may be necessary of the court to probe behind the pleadings  
 26 before coming to rest on the certification question. Even after a certification order  
 27 is entered, the judge remains free to modify it in light of subsequent developments  
 28 in the litigation.

29 *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). The present case is not one in which it is  
 30 “plain enough from the pleadings” whether the certification requirements are met. Instead, there

---

31       <sup>3</sup> Defendant does cite one case decided after the amendment of Rule 23, *Bennet v. Nucor*  
 32 *Corp.*, No. 3:04 CV 00291, 2005 WL 1773948 (E.D. Ark., 2005). However, this case applies the  
 33 requirements of Rule 23 prior to amendment. *Id.* at \*2 (“Rule 23(c) requires district courts to  
 34 make a determination as to whether a class action is maintainable ‘as soon as practicable after the  
 35 commencement of the action.’”).

1 are several open questions and contested facts regarding the make-up of the class that must be  
 2 resolved before representation can be assessed.

3 Under Rule 23, certification requires a finding by the district court that:

4 (1) the class is so numerous that joinder of all members is impracticable; (2) there  
 5 are questions of law and fact common to the class; (3) the claims or defenses of  
 6 the representative parties are typical of the claims or defenses of the class; and (4)  
 7 the representative parties will fairly and adequately protect the interests of the  
 8 class.

9 Fed. R. Civ. P. 23(a). Additionally, the court must find that at least one of the following  
 10 conditions is met:

11 (1) the prosecution of separate actions would create a risk of: (a) inconsistent or  
 12 varying adjudications or (b) individual adjudications dispositive of the interests of  
 13 other members not a party to those adjudications; (2) the party opposing the class  
 14 has acted or refused to act on grounds generally applicable to the class; or (3) the  
 15 questions of law or fact common to the members of the class predominate over  
 16 any questions affecting only individual members, and a class action is superior to  
 17 other available methods for the fair and efficient adjudication of the controversy.

18 F. R. Civ. P. 23(b). Ultimately, the plaintiff who seeks to have the class certified bears the  
 19 burden of proving that these requirement have been met.

20 Defendant argues that none of the Rule 23 requirements can be met here, indeed,  
 21 Plaintiffs and Defendant paint very different pictures of the class and its representatives.  
 22 Plaintiffs seek to represent “current and former Kyphon employees . . . includ[ing], but not  
 23 necessarily limited to all female citizens of the United States as part of Kyphon who are, or have  
 24 been employed by Kyphon in the United States as a part of Kyphon’s sales force.” SAC at ¶ 23.  
 25 Defendant argues that this class cannot possibly share common issues because its members are  
 26 spread over a large geographic area. Motion to Strike at 14. Defendant also maintains that  
 27 Plaintiffs are not typical of the class because many of them have been promoted and never were  
 28 actually denied training, and, more generally, because there is no typicality among them. As to  
 this last point, Defendant also points out that Plaintiffs were denied promotion for different  
 reasons, have different qualifications, and were assigned to different territories for different  
 purposes. *Id.* at 17-19. Finally, Defendant argues that there is a conflict of interest between  
 members of the class such that “the class members that are pregnant or have children (including  
 some of the Plaintiffs) . . . seek to establish that female class members that are not pregnant or do

1 not have children are favored at their expense.” *Id.* at 19.

2 Plaintiffs respond to these rather specific observations by characterizing the class claim in  
 3 very general terms, arguing simply that the class shares a common experience of Title VII  
 4 discrimination. Plaintiff’s Opposition at 9.<sup>4</sup> Plaintiff’s general and conclusory response does not  
 5 squarely address Defendant’s concerns and the requirements of Rule 23. To proceed with their  
 6 class action Plaintiffs at the very least must allege some specific commonality and typicality  
 7 among class members. Accordingly, the Court will grant the motion to strike, but also will grant  
 8 Plaintiffs a final opportunity to amend the class allegations of their complaint.

### 9                   **III. ORDER**

10                  IT IS HEREBY ORDERED that the motion to strike is GRANTED. Any amended  
 11 complaint must be filed within thirty (30) days of the date of this order.

16 DATED: October 12, 2007



17  
 18  
 19                  JEREMY FOGEL  
 20                  United States District Judge

27                  <sup>4</sup> Plaintiffs also refute the disparities between them named by Defendant, claiming that  
 28 they have been “highly exaggerated if not misrepresented.” *Id.* at 12.

1 This Order was served on the following persons:

2 Frederick J. Geonetta landglawyers@msn.com,

4 Harold R. Jones hrj@severson.com, ano@severson.com

6 Thomas Marc Litton tmlitton@compuserve.com,

8 Rhonda L. Nelson rln@severson.com,

10 David W. Sanford dsanford@nydclaw.com, fgilbert@nydclaw.com

12 Steven Lance Wittels swittels@nydclaw.com, sprasad@nydclaw.com

14 Notice will be delivered by other means to:

16 Shayna Bloom

17 Sanford Wittels & Heisler LLP

18 Suite 310

19 1666 Connecticut Avenue NW

20 Washington, DC 20009

22 Angela Corridan

23 Sanford Wittels & Heisler LLP

24 1666 Connecticut Avenue NW

25 Suite 310

26 Washington, DC 20009

28 Laura Fentonmiller

1 Sanford Wittels & Heisler LLP  
2 1666 Connecticut Avenue, NW  
3 Suite 310  
4 Washington, DC 20009  
5

6 Jeremy Heisler  
7 Sanford Wittels & Heisler  
8 950 Third Avenue  
9 10th Floor  
10 New York, NY 10022  
11

12 Grant Morris  
13 1666 Connecticut Avenue, N.W.  
14 Suite 310  
15 Washington, DC 20009  
16

17 Stefanie Roemer  
18 1666 Connecticut Avenue, N.W.  
19 Suite 310  
20 Washington, DC 20009  
21  
22  
23  
24  
25  
26  
27  
28